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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the California Constitution may, consistent with the Equal Protection Clause, as construed in *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist., No. 1*, 458 U.S. 457 (1982), prohibit state and local governments from enacting race- or gender-based preferences?

2. Whether a statewide initiative prohibiting preferences based upon race or gender, including such preferences as might be constitutionally permissible under the *Croson* strict scrutiny analysis, contravenes the holding in *Romer v. Evans*, 116 S.Ct. 1620 (1996)?

3. Whether a statewide initiative banning race- and gender-based preferences conflicts with and, therefore, is pre-empted by Title VII?

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STATEMENT OF THE CASE

On November 5, 1996, the people of the State of California adopted an amendment to their Constitution by popular vote. The amendment appeared on the ballot as Proposition 209 and added section 31 to Article I of the California Constitution. The section provides in part:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The California Legislative Analyst's Ballot Analysis of the measure distributed to the voters stated that it "would eliminate state and local government affirmative action programs in the areas of public employment, public education and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity, or national origin." State Resp. Brief App. 3a. However, the Analyst noted the specific programs affected by the measure would depend on "court rulings on what types of activities are considered 'preferential treatment.' " *Id.* With respect to public schools, the Legislative Analyst stated "[t]he measure *could* eliminate or cause fundamental changes to, *voluntary* desegregation programs run by school districts." *Id.* at 5a (first emphasis added). However, the analysis made clear that such programs would be affected only to the extent they involved preferences and were not court-ordered. Specifically, the Analyst noted that "magnet" schools could only be affected "in those cases where race or ethnicity are preferential factors in the admission of students." *Id.*

On November 6, 1996, the day after the statewide election at which Proposition 209 was enacted, and before

the California courts had an opportunity to consider the application of the measure to any concrete situation, the petitioners (a number of individuals and groups claiming to represent minorities and women) filed suit in the United States District Court for the Northern District of California against certain state officials ("state respondents") and other governmental defendants seeking to restrain the enforcement of Proposition 209 on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and is preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. *Coalition For Economic Equity v. Wilson*, 110 F.3d 1431, 1435 (9th Cir. 1997). A number of the governmental defendants who were themselves opposed to Proposition 209, including the City and County of San Francisco, aligned themselves with the position of the plaintiffs/appellees. *Id.* at 1435 n.2. The district court permitted Californians Against Discrimination and Preferences, an organization of proponents of Proposition 209, to intervene as a defendant. *Id.* at 1436. The district court issued a temporary restraining order and, later, a preliminary injunction against the enforcement of the preferential treatment ban in Proposition 209.[1] *Coalition For Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Ca. 1996); *see also Coalition For Economic Equity v. Wilson*, 110 F.3d at 1435.

The state respondents and the intervenor respondent appealed the issuance of the preliminary injunction. The Ninth Circuit Court of Appeals unanimously reversed the

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[1] The district court certified both a plaintiff class of all persons aggrieved by the preference ban of Proposition 209 and a defendant class of State officials and public agencies that would enforce the ban. *Coalition For Economic Equity v. Wilson*, 110 F.3d at 1435 n.3.

district court and vacated the injunction, finding that its decision was based upon an erroneous legal premise. First, using a "conventional" equal protection analysis, the court of appeals held that Proposition 209's ban on unequal treatment on the basis of race and gender *a fortiori* does not deny equal protection of the law; otherwise, "the central tenet of the Equal Protection Clause teeters on the brink of incoherence." *Id.* at 1439. Secondly, it rejected the argument that Proposition 209 reallocated authority in a racially discriminatory manner as occurred in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), because the measure does not create an exception for the treatment of race or gender issues, but rather, addresses those matters in a neutral fashion. *Id.* at 1443-1446. According to the court of appeals, impediments to preferential treatment do not deny equal protection. *Id.* at 1445. Finally, the court of appeals found that Proposition 209 was not preempted by Title VII since Congress expressly provided that state anti-discrimination laws that do not require or authorize a violation of its provisions are not preempted, and that the one command in Title VII regarding race and gender preferences makes it clear that such preferences are not required by Title VII, which is entirely consistent, the court found, with Proposition 209. *Id.* at 1447-1448.

REASONS FOR DENYING THE WRIT

1. This Facial Challenge Does Not Present Concrete Issues Related to the Application of Proposition 209 Which Has Yet to be Construed by California Courts.

Petitioners assert certiorari should be granted because the issue of whether and to what extent a state may limit the flexibility of public agencies to employ race

and gender preferences permitted or required by the Equal Protection Clause, "is one of fundamental and nationwide social and political importance." Petition at 9. Whatever nationwide interest and political importance may be attributed to the enactment of Proposition 209, the court of appeals' decision – that a measure that bans race and gender preferences is consistent with the Equal Protection Clause and Title VII – does not conflict with decisions of this Court and requires no "resolution" by this Court.

This case presents a facial challenge to Proposition 209 before it has been applied or interpreted by California courts. Yet, as this Court noted in *Arizonans For Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055 (1997), "[f]ederal courts lack competence to rule definitively on the meaning of state legislation . . . nor do they adjudicate challenges to state measures absent a showing of actual impact on the challenger. . . . " *Id.* at 1059. In the absence of any state court interpretation of the measure it is unclear exactly what the full impact of Proposition 209 will be in any particular application. However, state courts, like federal courts, are bound to construe a legislative enactment to fall within constitutional bounds if it is possible to do so. *Id.* at 1074. It must be presumed that California courts will not construe it in such a fashion as to violate the United States Constitution.

Moreover, since this is a facial challenge under both the Equal Protection Clause and the Supremacy Clause, the fact that in some hypothetical case involving a particular set of circumstances the application of Proposition 209 may raise issues of preemption or constitutionality does not support certiorari. That legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.

United States v. Salerno, 481 U.S. 739, 745 (1987); *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990) (state legislation should not be invalidated based on a worst case scenario that may never occur). Likewise, "[t]he existence of a hypothetical or potential conflict is insufficient to warrant the preemption of a state statute." *Rice v. Williams Co.*, 458 U.S. 654, 659 (1982). The Court must "consider the relationship between the state and the federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Roth Packing Co.*, 430 U.S. 519, 525-526 (1977).

In *Salerno*, this Court rejected a facial challenge where the statute was constitutional as applied in a large number of cases. 481 U.S. 749-750. Here, too, Proposition 209 is admittedly constitutional under most circumstances and as applied in a large fraction of cases. First, it would eradicate existing race and gender preferences that would not survive strict scrutiny.[2] Second, Proposition 209 would

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[2] Petitioners have suggested that since race- and gender-based affirmative action programs must meet federal constitutional standards, the only practical effect of Proposition 209 is to eliminate programs that would survive heightened scrutiny required by the Fourteenth Amendment. This assumes that all affirmative action programs, in fact, meet federal constitutional standards. Recent cases like *Engineering Contractors Association v. Metropolitan Dade County*, ___ F.3d ___, 1997 WL 535626 (11th Cir. 1997), and *Monterey Mechanical v. California State University*, ___ F.3d ___, 1997 WL 538757 (9th Cir. 1997), make it abundantly clear that this assumption is unwarranted. In those cases, and other cases, courts have determined that required findings of past discrimination by state or local entities were either non-existent, or sorely lacking.

In *Monterey Mechanical*, the Ninth Circuit struck down a California statute that established goals for participation by minorities and women in public contracting nine years after the

eliminate race and gender preferences which are constitutionally permissible, but not constitutionally required.[3] In both respects, it is consistent with the Constitution.

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decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), established the strict scrutiny standard for review of such preference programs. The court found that "the state made absolutely no attempt to justify the ethnic and sex discrimination it imposed" 1997 WL 538757 at *12. Hence, despite the lack of any evidence that remedial action was necessary, the statute impacted virtually every state contract for more than nine years. By eradicating constitutionally impermissible preferences, Proposition 209 serves the Constitution.

[3] It is undisputed that programs which could survive the heightened scrutiny required by the Fourteenth Amendment as interpreted in *Croson* and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), are generally permissible and not required. *See* Pet. 11-12. In *Adarand*, the Court adopted the analysis of *Croson* that race-based affirmative action programs must be justified by strict scrutiny. 515 U.S. at 222. *Adarand* did not address the issue of under what circumstances these remedial programs are *mandated*, but rather when "the government is not disqualified" from using preferences. *Id.* at 237. To justify a program under *Adarand* and *Croson*, a government agency is not required to find that it is guilty of discrimination or that it is perpetuating its own discrimination, but instead that a strong basis in evidence exists for concluding remedial action is necessary. *See Adarand*, 515 U.S. at 222; *Croson*, 488 U.S. at 500 (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion). Moreover, a program may be initiated when government affects discrimination in the private sector. *Croson*, 488 U.S. at 503-504 (plurality opinion). However, nothing therein suggests that the Equal Protection Clause *requires* affirmative action programs. *Austin Black Contractors Association v. City of Austin*, 78 F.3d 185, 186 n.3 (5th Cir. 1996) (per curiam) (citing cases); *Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381 (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).

Third, Proposition 209 does not impact those race- and gender-conscious measures designed to eliminate discrimination but which do not grant preferential treatment on the basis of race or gender. To be sure, state and local governments have an affirmative obligation to take action to eliminate their own discrimination and its vestiges. *See e.g., United States v. Fordice*, 505 U.S. 717, 727-728 (1992); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (opinion of O'Connor, J.). In some cases the remedy may be race-conscious, as in altering student attendance patterns to achieve desegregation. However, as the Ninth Circuit noted, not all race-conscious or gender-conscious remedies involve discriminatory preferences. *Coalition for Economic Equality v. Wilson*, 110 F.3d at 1438 n.7, 1445 n.16. Nothing suggests that a government agency initiating a voluntary affirmative action program to remedy past discrimination is ever obligated to provide preferences on the basis of race to persons who are not actual victims of discrimination.[4] *Cf. Bazemore v. Friday*, 478 U.S. 385, 407-408 (1986) (White, J., concurring.).

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[4] In a "Response Supporting Petition for Writ of Certiorari," the City and County of San Francisco, the County of Marin, and the City of Pasadena appear to argue that public entities face a *duty* to grant racial preferences under certain circumstances. Response at 12-16. San Francisco suggests that it had a duty to enact an ordinance which grants bid preferences to minority- and woman-owned businesses in City contracting. In support of this point San Francisco cites findings that it discriminated in public contracting, that race-neutral remedial efforts were inadequate, and that, therefore, the racial preferences which the City adopted were constitutionally required. In fact, the only judicial findings relating to San Francisco's preference program made by the court of appeals were that the trial court had neither abused its discretion nor made clearly erroneous findings of fact in denying preliminary

Fourth, because Proposition 209 is an anti-discrimination law, it fully permits remedial action which restores actual victims of discrimination to their "rightful place". Such remedial action is not a preference prohibited by Proposition 209.[5] *See Coalition for Economic Equity v. Wilson* 110 F.3d at 1438 n.7. Petitioners do not contend that Proposition 209 prevents a public employer from complying with either a state or federal court order mandating a race-preferential or gender-preferential remedy based upon a finding of a violation of the Equal Protection Clause or of Title VII. Petition at 15 n.12. Indeed, State or federal courts enforcing a federal statute are not limited by state law.[6]

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relief. *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1405, 1414 (9th Cir.1991).

These "respondents" also argue that Proposition 209 is particularly harmful because the jurisdictional and procedural constraints on the authority of state or local subdivisions to remedy discrimination under *Croson* purportedly render only local governments able to remedy local discrimination. Response at 10. Ironically, the very passage from *Croson* cited to support this argument expressly notes that political subdivisions must be delegated that requisite authority by the State. 488 U.S. at 491-492 n.2 (noting undisturbed finding that city had authority to enact set-aside program under state law).

[5] Subdivision (d) of Proposition 209 provides that prior consent decrees and orders are not invalidated. Petitioners read subdivision (d) to mean that "Proposition 209 makes no allowance for preferences that a state court would otherwise order as remediation for adjudicated violations of state constitutional or statutory antidiscrimination law." Petition at 15. However, Proposition 209 does not prohibit a court from taking whatever steps are necessary to secure a remedy for actual victims of a violation of state or federal law.

[6] Courts have treated race-preferential or gender-preferential remedies as strong medicine with serious side

Petitioners posit one "conceivable" circumstance in which there would be an affirmative duty on the part of state and local governments to employ race preferences and gender preferences, namely, "[w]here a court *would properly order* such a constitutional remedy." Petition at 11 (emphasis added). The "issue" underlying this vague hypothetical – whether, in the absence of a court order, preferences to non-victims of discrimination need ever be initiated by a public agency in lieu of actual compensation or other relief to the actual victims – is highly factual. That extreme factual situation is not before this Court. It may or may not be presented when courts begin to address an *application* of Proposition 209 in a specific fact context. Should the issue arise in a concrete situation, state courts, like federal courts, are bound to construe a legislative enactment to fall within constitutional bounds if it is possible to do so. *Arizonans For Official English v.*

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effects to be used as a "last resort" in only the most egregious circumstances. This Court in *United States v. Paradise*, 480 U.S. 149 (1987), upheld a court-ordered remedy for a proven violation of the Equal Protection Clause which required a public agency to promote qualified black employees on a quota basis. A more extreme case can hardly be conceived. For many years, the defendant in *Paradise* had ignored court orders and failed to honor consent decrees which committed the defendant to establish a testing procedure which did not discriminate against blacks. Given defendant's intransigence and the particular circumstances, the court used the only effective remedy available to it under the circumstances. *Paradise*, 480 U.S. at 176-177. Significantly, however, this remedy was applicable only until the defendant established a procedure which did not have a discriminatory impact on blacks. The decision in *Paradise* was supported not only by the governmental interest in eradicating discriminatory practices, but also by the societal interest in ensuring compliance with the judgments of federal courts. 480 U.S. at 170-171.

Arizona, 117 S.Ct. at 1074. Therefore, it must be presumed that California courts will construe Proposition 209 in such a fashion as to be consistent with the United States Constitution. Petitioners' hypothetical case that, depending on the facts and the California courts' interpretation of Proposition 209, there might be a conflict between Proposition 209 and federal law, does not provide a basis for invalidating the measure on its face. Nor does it present an issue of nationwide importance such as to warrant certiorari.

2. Since Proposition 209 is Not Inconsistent with the Rule of *Washington v. Seattle School District No. 1* and *Hunter v. Erickson*, There is No Reason to Grant Certiorari in this Case.

Notwithstanding the fact that Proposition 209 demands equality of treatment without regard to race or gender in government employment, contracting, and education, the petitioners claim that it creates both a racial and gender classification which cannot be justified. Specifically, they contend that the measure reallocates governmental decision-making to place an unusual burden on the interests of minorities and women in violation of the rule established in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982). *Hunter* and *Seattle* together stand for the proposition that the Equal Protection Clause's guarantee is violated when a law alters the governmental decision-making process to thereby impose substantial and peculiar burdens on racial minorities.[7] *Seattle*, 458 U.S. at 485.

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[7] Petitioners also contend that women, who historically have been the victims of gender discrimination, are in the same

A. Peculiar Burden Analysis

Respondents submit the Ninth Circuit correctly rejected these contentions, that court having perceived that Proposition 209 is not a measure which burdens other measures or processes designed to ensure equal treatment; instead Proposition 209 demands equal treatment by its own terms. The court observed Proposition 209 does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity, nor does it treat race and gender antidiscrimination laws in one area differently from such laws in another area – it simply prohibits *all* race and gender preferences by state entities. As will be explained, the Ninth Circuit's decision poses no conflict with this Court's decisions in *Seattle* and *Hunter*, and does not call for certiorari.

Initially, the court of appeals applied a conventional equal protection analysis. *Coalition for Economic Equity v. Wilson*, 110 F.3d at 1439-1441. Rather than classifying individuals by race or gender, Proposition 209, the court held, prohibits the State from making such classifications. "Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Id.* at 1440. It does not appear petitioners question this finding.[8]

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position as minorities for the purposes of the holdings in *Hunter* and *Seattle*.

[8] Two of petitioners' counsel have authored a law review article that acknowledges "a court would have a very hard time invalidating the CCRI [Proposition 209] under the conventional equal protection doctrines concerning facial discrimination or illicit motive." Amar & Caminker, *Equal Protection, Unequal Burdens, and The CCRI*, 23 Hastings Const. L.Q. 1019, 1024

The Ninth Circuit next rejected the applicability of a less familiar type of Equal Protection analysis based on *Hunter* and *Seattle*.

In *Hunter*, the voters adopted a city charter amendment that both repealed an existing city council ordinance prohibiting racial discrimination in housing and required any future ordinances of this type to be confirmed by a popular vote. Thus, the focus and effect of the charter amendment was to burden the enactment of legislation designed to *prevent* discrimination in housing, thereby disadvantaging minority groups who would presumptively benefit from such legislation. In *Seattle*, the challenged enactment, Initiative 350, was designed to restrict school desegregation. The enactment eliminated non-preferential actions previously adopted by the Seattle school board to overcome the effects of historical racial housing patterns, and removed authority of local school boards to adopt desegregation plans in the future. Thus, the challenged enactment had a "racial focus" directed at preventing integration of a school system affected by de facto segregation. De facto segregation is disadvantageous to minority students even if it does not violate the Equal Protection Clause.[9] *See e.g., Jackson v. Pasadena School Dist.*, 59 Cal.2d 876, 880-882, 31 Cal. Rptr. 606, 608-610 (1963) (citing discussion in *Brown v. Board of Education*, 347 U.S. 483, 493-495 (1954)). Thus, both *Hunter*

(1996). Rather, they contend the measure is "vulnerable to attack under a less familiar and more nuanced branch of the equal protection doctrine. . . . " *Id.*

[9] Initiative 350 did not affect voluntary participation in magnet schools and did not prohibit preferences based upon race. *See Seattle School Dist. No. 1 v. State*, 473 F. Supp. 996, 1013-1014 (W.D. Wash. 1979) (quoting terms of Initiative 350).

and *Seattle* dealt with enactments that burdened measures which ensured equal treatment to persons seeking housing and students obtaining a basic education.

More specifically, in *Seattle*, the elimination of the school district's desegregation plan and the erection of a barrier to the enactment of such plans in the future burdened the ability of minority racial groups to pursue legislation that would directly provide students with an integrated learning environment. Such measures, adopted to achieve integration, did not require preferential treatment, but equal treatment. Nor did the mandatory assignment of students in the desegregation plan barred by Initiative 350 burden the individual rights of the non-minority students to compete for educational opportunities or give minority students a competitive advantage. *See University of California v. Bakke*, 438 U.S. 265, 300 (1978) (Opinion of Powell, J.) ("The school desegregation cases are inapposite"); *see also id.* at 300 n.39; *United States v. Paradise*, 480 U.S. 149, 187 n.2 (1987) (Powell, J., concurring); *cf., Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381, 1386-1388, 1389 n.13. (9th Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).[10] In *Hunter*, the anti-discrimination ordinances involved no separate competing right because there is clearly no constitutionally protected right to discriminate on the basis of race in private housing sales or leases. *Cf., e.g., Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

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[10] In *Swann v. Board of Education*, 402 U.S. 1, 16 (1971), this Court noted that the broad discretion of school authorities authorized voluntary integration efforts through assignment of students based on race, even in the absence of a constitutional violation.

In stark contrast to the measures involved in *Seattle* and *Hunter*, Proposition 209 eliminates only the ability of anyone and everyone to pursue government action which provides a preference on the basis of race or gender in areas of government where persons are competing for limited benefits or resources. The petitioners do not seek protection from a measure that impedes state action aimed at expressly preventing discrimination, but rather they assert a right to pursue legislation that *explicitly discriminates against persons on the basis of race and gender.* Such legislation, however, would cause injury to members of the non-preferred racial classes and males, which is a countervailing interest of constitutional dimension. *Adarand*, 515 U.S. at 290; *cf., Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). To conclude that the practical effect of Proposition 209 is to single out minority groups, is to accept the theory of "benign discrimination" which has been rejected by this Court. *Adarand* 515 U.S. at 226-229; *cf., Mississippi University for Women v. Hogan* 458 U.S. at 723-724.

However, petitioners contend that the *unequal* treatment implicit in Proposition 209 is that legislation granting race and gender preferences is singled out for regulation at the constitutional level while other preferences could be the subject of regulation at various levels of government. The flaw in the argument is its premise that "preferences" are a field of legislation. "Preference" is not a discrete subject of legislation, but a system that provides for unequal classes with respect to a particular subject of legislation.

Proposition 209 recognizes that preferences are a form of discrimination because, as the court of appeals noted, "[w]hen the government prefers individuals on

account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender." *Coalition For Economic Equity v. Wilson*, 110 F.3d at 1439; *see also Adarand*, 515 U.S. at 229-230. Preferential treatment based on race must be justified by a compelling state interest, and narrowly tailored. *Adarand*, 515 U.S. at 235. A classification based on gender must be supported by an "exceedingly persuasive justification." *United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 2274 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. at 724. Thus, both race and gender preferences are subject to a burden that other classifications are not. It is, therefore, illogical to compare race or gender preferences to preferences in other areas of legislation.

The flaw in the argument that Proposition 209 singles out minorities and women for disadvantaged treatment is revealed in the Amar and Caminker law review article that petitioners contend supports their claim. In discussing the "Racial in Character" test set forth in *Hunter* the authors note:

> By contrast, a racial classification in the *Hunter* sense does not trigger strict scrutiny unless the classification is the basis for the imposition of a special political process burden on racial minorities. This must be so, or else antidiscrimination laws such as Title VII that (like the Akron charter amendment) employ the concept of "race" would themselves be constitutionally suspect.

Amar & Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1029 (1996). Proposition 209, like Title VII, is an antidiscrimination law. It does not impose any political burden on minorities and women other than the "burden" of nondiscrimination. That is not a "special political process burden."

B. Political Structure Analysis

The court of appeals also properly rejected the claim that Proposition 209 allocates or "restructures" government power to curtail the operation of those political processes ordinarily to be relied upon to protect a racial group. *See Seattle*, 458 at 485-486; *see also Crawford v. Board of Education of the City of Los Angeles*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring). In *Hunter* and *Seattle*, racial minorities were held to be burdened by the imposition of additional and unusual requirements upon the existing governmental process that negatively impacted their ability to use the political process to protect themselves against discrimination.

In *Hunter*, for example, the city charter amendment imposed an automatic referendum applicable only to antidiscrimination measures, a substantial departure from the normal way of enacting local housing legislation, which otherwise remained unaffected. 393 U.S. at 390. Under the measure invalidated in *Seattle*, local school boards retained the authority to adopt student assignment policies on virtually every basis *except* with respect to mandatory busing for the purpose of achieving integration, which would have required a statewide vote. 458 U.S. at 462-463. Again, the invalidated measure skewed the political decision-making process to leave the school boards with complete discretion as to student assignments except to deny them any discretion as to student assignments on the basis of race. In the Court's view, both of these circumstances represented a manipulation of the political or decision-making process on racial grounds to the peculiar disadvantage of minority interests.

Proposition 209, on the other hand, has changed the substantive rights of all Californians generally, by guaranteeing equal opportunity in public education, employment, and contracting. California's policy on the issue of racial and gender equality is a matter of state constitutional, as well as federal constitutional law. *See* Cal. Const. art. I, §§ 7, 8.[11] The historical background of the enactment of Proposition 209 demonstrates that Proposition 209 established a new state constitutional policy with respect to discrimination in the form of race- and gender-based preferences.

In 1980, the California Supreme Court refused to invalidate a county's race-preferential affirmative action program. *Price v. Civil Service Commission*, 26 Cal. 3d 257, 161 Cal. Rptr. 475. The California court declined to construe the state constitution's equal protection clause to provide greater protection against injury from race-preferential programs than the Equal Protection Clause of the Fourteenth Amendment. 26 Cal.3d at 284-285, 161 Cal. Rptr. at 492-493. A year later, in *DeRonde v. Regents of the University of California*, 28 Cal. 3d 875, 172 Cal. Rptr. 677 (1981) *cert. denied* 454 U.S. 832 (1981), the California Supreme Court similarly upheld a race-preferential admissions program of the University of California, Davis, Law School against an equal protection challenge.

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[11] The Supreme Court of California may interpret California's constitutional guarantee of equal protection differently from this Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment. Cal. Const. art. I, § 24. It has, for example, ruled that the California Constitution's equal protection clause provides greater protection against gender-based discrimination than does its counterpart in the federal constitution. *See Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 15-20, 95 Cal. Rptr. 329, 338-342 (1971).

Justice Mosk vigorously dissented in both cases. *See Price*, 26 Cal. 3d at 286-300, 161 Cal. Rptr. at 493-502; *DeRonde*, 28 Cal. 3d at 891-907, 172 Cal. Rptr. at 686-696. He asserted that all racial preferences violate the principle of equal protection:

> If affirmative action means preparation and training for the underprivileged so that they may have the skills to compete on a basis of equality, then it is an essential program. But if affirmative action is interpreted as justifying preferences in the actual competition for society's benefits, then it is undemocratic and violative of the *equal* protection clauses of the federal and state Constitutions.

Price, 26 Cal. 3d at 288 n.2, 161 Cal. Rptr. at 495 n.2. (emphasis in original). Past and present members of this Court have expressed similar views. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312, 336-337 (1974) (Douglas, J., dissenting); *Croson*, 488 U.S. at 520-528 (Scalia, J., concurring).

In enacting Proposition 209 in 1996, the people of California amended the state constitution to adopt a policy of racial and gender neutrality that the California Supreme Court had rejected in *Price* and *DeRonde* as a matter of state constitutional interpretation. This Court has refused to "interpret the Fourteenth Amendment to require the people of a state to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Crawford v. Board of Education*, 458 U.S. 527, 540 (1982). Accordingly, a constitutional amendment changing the policy of the state on racial and gender preferences is not a restructuring of the decision-making process.

Moreover, there is nothing unique, peculiar or skewed about a state-wide policy on discrimination. The

protection of individual rights is clearly an appropriate subject for a state constitution. Discrimination and unequal treatment by public entities in the areas of contracting, education, and employment should not be a local option. "[I]ndividuals who were unable to vote for the *local* representatives who enacted a race-conscious program may nonetheless feel the effects of that program." *Adarand*, 515 U.S. at 252 (Stevens, J., dissenting) (emphasis added). The State, acting through its constitution or by legislation adopting a policy of statewide interest, has the power to determine at the state level the scope or permissibility of race or gender preferences in affirmative action programs for all entities of government. In this regard, the State has itself "preempted" local law in the field of housing and employment discrimination. *See* Cal. Gov't Code § 12993(c); *Delaney v. Superior Fast Freight*, 14 Cal. App. 4th 590, 596-598, 18 Cal. Rptr. 2d 33, 36-38 (1993). The State has, in addition, determined that the breadth of participation in public contracting is a matter of state-wide interest. *See Domar Electric, Inc. v. City of Los Angeles*, 41 Cal. App. 4th 810, 821, 48 Cal. Rptr. 2d 822, 829 (1995) (Cal. Public Contract Code § 2000, regulating minority and women business enterprise requirements for *local* public works contracts preempts inconsistent city charter provisions because the subject is a matter of state-wide concern). In *Seattle*, the majority of this Court expressly disavowed any intent to create a "vested constitutional right to local decision-making." 458 U.S. at 480 n.23.

The Ninth Circuit correctly determined that this Court's decision in *Crawford* was applicable to the enactment of Proposition 209. There, the Court held that a state constitutional provision may properly address even a race-related matter in a neutral fashion. In *Crawford*, the

Court reviewed an amendment to the California Constitution that prohibited state courts from mandating pupil assignment or transportation except to remedy a specific equal protection violation. 458 U.S. at 529. *Crawford* noted that "the Equal Protection Clause is not violated by the mere *repeal of race-related* legislation or *policies* that were not required by the Federal Constitution in the first place." *Id.* at 538 (emphasis added.). That is exactly what Proposition 209 does – it repeals the policy established by the California Supreme Court in *Price* and *DeRonde*.

In sum, neither *Seattle* nor *Hunter* addressed the issue of *preferential* treatment. "The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to *full* participation in the political life of the community." *Seattle*, 458 U.S. at 467 (emphasis added). It does not provide them a *superior* right of participation. No decision of this Court has held that the Equal Protection Clause guarantees anyone a *right* to pursue legislation and administrative action that discriminates against others on the basis of race or gender or precludes a state constitution from prohibiting such discrimination. The court of appeals' decision is neither controlled by, nor contrary to, the precedent of *Seattle* or *Hunter*. There is no need for this Court to consider the applicability of those cases to the court of appeals' decision in this case.

3. This Court's Decision in *Romer v. Evans* is Not Applicable to this Case.

For similar reasons, the court of appeal's decision does not stand in conflict with this Court's decision in *Romer v. Evans*, ___U.S.___, 116 S.Ct. 1620, 1627-1629 (1996). In *Romer*, the Court held that the Equal Protection Clause prohibited a state from singling out a certain group of citizens based on sexual orientation. *Id.* at

1626-1627. There, the group members were held to have been denied protection from discrimination because the state enactment precluded the use of the political process to achieve passage of *any* law that protected them from discrimination. *Id.* at 1625-1627. The Court held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek the aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 1628.

The *Romer* decision is clearly inapposite. In the case at bar, no group of persons is singled out for *disadvantageous* treatment. All races and both genders are treated equally by the prohibition against all forms of discrimination, including the adoption of preferences, and everyone has the same opportunity to seek the same legislation of interest to any group. In *Romer*, as in *Hunter*, the state restriction at issue adversely affected the ability of minority groups to promote legislation that would *prevent* discrimination against that class of persons. In the case at bar, the challenged restriction limits only plaintiffs' right to promote legislation that inherently, explicitly, and by design, discriminates against other persons on the basis of race or gender. The Ninth Circuit pointed out the obvious difference between this case and *Seattle* and *Hunter* and *Romer* as well:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection.

Coalition For Economic Equity v. Wilson, 110 F.3d at 1445. Accordingly, Proposition 209 does not violate the Equal Protection Clause and the Ninth Circuit decision is not in

conflict with *Romer* or any other decision of this Court. *Romer* provides no reason for this Court to grant certiorari.

4. Since Proposition 209 is Consistent with the Purposes of Title VII, There is No Reason to "Clarify" Whether It is Preempted by Title VII.

Petitioners contend that this Court should grant certiorari to "clarify" whether Proposition 209 "impede[s] Title VII's national policy of encouraging state and local governments voluntarily to remedy their own past discrimination."[12] Petition at 27. There is no need to "clarify" whether Proposition 209 is preempted in its entirety by Title VII because it clearly is not. There are two defects in petitioners' contention. First, it is premised on the erroneous view that a statute creates a national policy, rather than reflecting and thus implementing a national policy. Second, Proposition 209 does not prevent voluntary action by government agencies to remedy their own past discrimination. It simply precludes a "remedy" which discriminates against innocent parties.

In enacting Title VII, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The language of Title VII itself, namely, section 708 of Title VII, 42 U.S.C. § 2000e-7, expressly states the intent of Congress to preserve laws that do not require or permit employment practices that violate Title VII. Section 708 provides as follows:

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[12] Unlike their assertions regarding the Equal Protection Clause, petitioners do not contend Title VII mandates racial or gender preferences to be initiated by a public employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (Title VII does not require preferences for minorities or women).

> *Nothing* in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or *future law* of any State or political subdivision of a State, other than any such law which purports *to require or permit the doing of any act which would be an unlawful employment practice* under this title.

78 Stat. 262 (codified at 42 U.S.C. § 2000e-7) (emphases added). Section 1104 of Title XI, which is *generally* applicable to all of the Civil Rights Act, provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State Laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is *inconsistent* with any of the purposes of this Act, or any provision thereof.

78 Stat. 268 (codified at 42 U.S.C. § 2000h-4) (emphasis added).

In determining whether a state law is preempted by federal law and therefore invalid under the Supremacy Clause, the court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987) (Marshall, J. plurality). "[P]re-emption is not to be lightly presumed." *Id.* at 281. Preemption will be found only if that was the clear and manifest purpose of Congress. *Guerra*, 479 U.S. at 288; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Because it was never the purpose of Congress to preempt a state law prohibiting race and gender preferences in employment, it is clear that Proposition 209 is not preempted by a so-called "national policy."

Indeed, the "policy," expressed in the congressional history of Title VII, is an intent to preserve (1) employers' managerial discretion in hiring and promotion of employees free from interference from *federal regulation*, and (2) the discretion of States to enact their own laws preventing discrimination in employment on the basis of race and gender. With respect to Title VII, "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law." *Guerra*, 479 U.S. at 281. That intent is found in Section 708 of Title VII and section 1104 of Title XI. In view of these two sections, the plurality of four justices in *Guerra* held that "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII" because sections 708 and 1104 "provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practices." *Id.* at 282. "Sections 708 and 1104 severely limit Title VII's pre-emptive effect." *Id.* "The narrow scope of pre-emption available under §§ 708 and 1104 reflects the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity." *Id.* at 282-283.[13]

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[13] Justice Marshall authored the opinion of the Court in *Guerra*. Three other justices concurred in Part III A (479 U.S. at 280-284) which discusses the preemptive scope of Title VII. Justice Scalia, in concurring in the judgment, concluded that both section 708 and section 1104 are anti-preemption provisions and that section 708 narrows the scope of Title VII to limit its preemptive effect to "laws which purpor[t] to require or permit the doing of any act which would be an unlawful employment practice" under the title. 479 U.S. at 295-296 (Scalia, concurring (quoting section 708)). Justice Stevens, in his concurring opinion, declined to concur in Part III A of the lead opinion because he was not sure whether Justice Marshall had concluded that section 1104 was applicable to Title VII or

Accordingly, both sections 708 and 1104 reflect the congressional purpose to preserve state anti-discrimination laws and to invalidate only laws that are "inconsistent" with Title VII. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103, n.24 (1983); *see also Guerra*, 479 U.S. at 282, n.12 (discussing legislative history of section 1104). Thus, state laws may prohibit employment practices that are permissible under Title VII. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. at 103 ("Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit."). Congress clearly intended to not interfere with state laws unless they actually conflict with Title VII.

Proposition 209 does not conflict with Title VII. Prohibiting an employer from granting a preference on the basis of race or gender, does not violate any provision of Title VII. Title VII demands equality of treatment, but "does not demand that an employer give preferential treatment to minorities or women." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *see also Johnson v. Transportation Agency*, 480 U.S. at 644 (1987) (Stevens, J., concurring) ("It remains clear that the Act does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of minority groups for whose protection the statute was enacted.") (emphasis in original).

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whether section 708, as Justice Scalia suggested, "is the only provision governing Title VII's pre-emptive scope." *Id.* at 292 n.1. Justice Stevens admitted that Justice Scalia's analysis of the issue "may be correct." *Id.*

Petitioners nevertheless contend that this Court should grant certiorari to consider whether Proposition 209 is preempted because it is an obstacle to the purposes of Title VII. Petition at 27-30. A state law is preempted when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal statute. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491-492 (1987). The fact that Proposition 209 prohibits race-preferential and gender-preferential employment programs by public employers and that Title VII does not prohibit them does not establish preemption under the "obstacle" theory of conflict. As noted above, for a state law to be an "obstacle" to the purposes of Title VII, it would have to be inconsistent with purpose of the measure. *Guerra*, 479 U.S. at 281. The purpose of Title VII is the achievement of "equality of employment opportunity." *Griggs v. Duke Power Co.*, 401 U.S. at 429-431.

To be sure, this Court has held that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII. *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986); *United Steelworkers of America v. Weber*, 443 U.S. at 204; *accord Johnson v. Transportation Agency*, 480 U.S. at 629-631, 630 n.8. However, "voluntary compliance" does not equate to race preferential or gender programs. It includes any number of actions that eliminate "'employment practices and systems which constitute barriers to equal employment opportunity.' " *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 515-516 (quoting 29 C.F.R. § 1608.1 (b) (1985)). It also "*may* include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination." *Id.* at 516 (emphasis added). This Court has never stated that race-preferential

or gender-preferential programs are necessary rather than simply "appropriate" to achieve the purposes of, and be consistent with Title VII. *Cf. e.g., id.* at 517-518; *Johnson v. Transportation Agency,* 480 U.S. at 639-640. "Congress was not legislating about preferential treatment or quotas in employment because it believed that the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. at 520 (quoting 110 Congressional Record 15893 (1964) (remarks of Rep. MacGregor) (internal quotations omitted)); *United Steelworkers of America v. Weber,* 443 U.S. at 207-208, n.7; *see also Hazelwood School District v. United States,* 433 U.S. 299, 309 (1977).

When Title VII was enacted Congress was particularly concerned to avoid undue *federal* interference with managerial discretion of employers. "The conclusion in *Weber* that 'Congress chose not to forbid all voluntary race-conscious affirmative action' when it enacted Title VII was largely based upon the legislative history, which shows that Congress was particularly concerned to avoid *undue federal influence* with managerial discretion." *Local No. 93 Int'l Ass'n of Firefighters v. Cleveland,* 478 U.S. at 519 (quoting *United Steelworkers of America v. Weber,* 443 U.S. at 205-207) (emphasis added). Therefore the passage of Title VII was obtained on the assurance that under Title VII "management prerogatives . . . are to be left undisturbed to the greatest extent possible." *Id.* at 520. But the assurance related to protection of those prerogatives from federal laws like Title VII, not from state laws.[14] Indeed,

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[14] Congress was aware that numerous states had anti-discrimination laws already in place when Title VII was

those opposed to Title VII were fearful of federal regulators interfering with local matters. *See United Steelworkers of America v. Weber*, 443 U.S. at 206; *see also* Vass, *Title VII, Legislative History*, 7 Boston College Industrial Commercial Law Review 431, 449-451.

Nor do the EEOC Guidelines interpreting Title VII demonstrate a policy of federal interference with state governmental decisions. In 29 C.F.R. § 1608, the EEOC sets forth guidelines for employers to use in adopting voluntary affirmative action programs. The express purpose of these guidelines is not to analyze the relationship of Title VII to state laws, but to provide employers that wish to use affirmative action an official interpretation under section 713 of Title VII, 42 U.S.C. § 2000e-12, in order to protect them from violating Title VII by "reverse discrimination" against non-minority applicants and employees. 29 C.F.R. § 1608.1.[15]

The Guidelines conclude that it was the intent of Congress that voluntary compliance with Title VII by employers is to be encouraged. 29 C.F.R. § 1608.1 (b) and (c). However, the Guidelines do not equate voluntary

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enacted. *See, e.g.*, 110 Congressional Record 6548, 6550 (1964) (remarks of Senator Humphrey); 110 Congressional Record 7205 (1964) (remarks of Senator Clark); 110 Congressional Record 13089 (1964) (remarks of Senator Saltonstall). Congress knew those existing state laws regulated the "management prerogatives" of employers in the states in which they were in effect.

[15] "Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection *against Title VII liability* which the Commission is authorized to provide under section 713(b)(1)." 29 C.F.R. § 1608.1(c) (emphasis added).

compliance solely with race-preferential and gender-preferential programs. Indeed, they provide for many "affirmative" actions that do not involve preferences. *See* 29 C.F.R. § 1608.4; 29 C.F.R. § 1607.17.

Moreover, the Guidelines do not purport to address the issue of preemption of state laws. They represent the EEOC's interpretation of permissible affirmative action methods. Indeed,"[w]here an affirmative action . . . program does not exist, . . . these Guidelines are inapplicable." 29 C.F.R. § 1608.11 (b). Accordingly, the fact that the EEOC has interpreted Title VII to encourage voluntary action "to correct the effects of past discrimination and to prevent present and future discrimination," 29 C.F.R. § 1608.1 (c), does not demonstrate that a state prohibition of preferential programs is inconsistent with, or stands as an obstacle to, the purpose of Title VII to achieve equal employment opportunities by prohibiting discrimination in employment while leaving the issue of preferential treatment and quotas to state and local governments and employers.

In sum, Congress in enacting Title VII expressed an intent to remain "neutral" on the issue of preferences based upon race and gender, leaving that to state or local governments. In this case, California embraced a rule for public entities of equality of treatment in employment decisions regardless of race or gender. That rule neither conflicts with the letter or purpose of Title VII. Therefore, the court of appeals correctly found that Proposition 209 is not preempted. There is no "national policy" of Title VII that Proposition 209 "impedes." There is no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, state respondents respectfully urge this Court to deny the petition for certiorari.

Dated: September 29, 1997.

Respectfully submitted,

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Appendix A

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[LOGO] **Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities. Initiative Constitutional Amendment.**

Official Title and Summary Prepared by the Attorney General

PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES. INITIATIVE CONSTITUTIONAL AMENDMENT.

- Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.
- Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.
- Mandates enforcement to extent permitted by federal law.
- Requires uniform remedies for violations. Provides for severability of provisions if invalid.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- The measure could affect state and local programs that currently cost well in excess of $125 million annually.
- Actual savings to the state and local governments would depend on various factors (such as future court

decisions and implementation actions by government entities).

Analysis by the Legislative Analyst

BACKGROUND

The federal, state, and local governments run many programs intended to increase opportunities for various groups – including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. For example, state law identifies specific goals for the participation of women-owned and minority-owned companies on work involved with state contracts. State departments are expected, but not required, to meet these goals, which include that at least 15 percent of the value of contract work should be done by minority-owned companies and at least 5 percent should be done by women-owned companies. The law requires departments, however, to reject bids from companies that have not made sufficient "good faith efforts" to meet these goals.

Other examples of affirmative action programs include:

- Public college and university programs such as scholarship, tutoring, and outreach that are targeted toward minority or women students.
- Goals and timetables to encourage the hiring of members of "underrepresented" groups for state government jobs.
- State and local programs required by the federal government as a condition of receiving federal funds (such as requirements for minority-owned

business participation in state highway construction projects funded in part with federal money).

PROPOSAL

This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve "preferential treatment" based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires the continuation of certain programs.

The measure provides exceptions to the ban on preferential treatment when necessary for any of the following reasons:

- To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

FISCAL EFFECT

If this measure is approved by the voters, it could affect a variety of state and local programs. These are discussed in more detail below.

Public Employment and Contracting

The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. Contracts affected by the measure would include contracts for construction projects, purchases of computer equipment, and the hiring of consultants. These prohibitions would not apply to those government agencies that receive money under federal programs that require such affirmative action.

The elimination of these programs would result in savings to the state and local governments. These savings would occur for two reasons. First, government agencies no longer would incur costs to administer the programs. Second, the prices paid on some government contracts would decrease. This would happen because bidders on contracts no longer would need to show "good faith efforts" to use minority-owned or women-owned subcontractors. Thus, state and local governments would save money to the extent they otherwise would have rejected a low bidder – because the bidder did not make a

"good faith effort" – and awarded the contract to a higher bidder.

Based on available information, we estimate that the measure would result in savings in employment and contracting programs that could total tens of millions of dollars each year.

Public Schools and Community Colleges

The measure also could affect funding for public schools (kindergarten through grade 12) and community college programs. For instance, the measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. (It would not, however, affect *court-ordered* desegregation programs.) Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools) and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities. We estimate that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected by the measure.

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin.

Funds spent on these programs total at least $15 million each year.

Thus, the measure could affect up to $75 million in state spending in public schools and community colleges.

The State Constitution requires the state to spend a certain amount each year on public schools and community colleges. As a result, under most situations, the Constitution would require that funds that cannot be spent on programs because of this measure instead would have to be spent for *other* public school and community college programs.

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University (CSU) uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so. In 1995, the regents of the University of California (UC) changed the UC's admissions policies, effective for the 1997-98 academic year, to eliminate all consideration of race or ethnicity. Passage of this initiative by the voters might require the UC to implement its new admissions policies somewhat sooner.

Both university systems also run a variety of assistance programs for students, faculty, and staff that are targeted to individuals based on sex, race, or ethnicity. These include programs such as outreach, counseling, tutoring, and financial aid. The two systems spend over

$50 million each year on programs that probably would be affected by passage of this measure.

Summary

As described above, this measure could affect state and local programs that currently cost well in excess of $125 million annually. The actual amount of this spending that might be saved as a result of this measure could be considerably less, for various reasons:

- The amount of spending affected by this measure could be less depending on (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires continuation of certain programs.
- In most cases, any funds that could not be spent for existing programs in public schools and community colleges would have to be spent on other programs in the schools and colleges.
- In addition, the amount affected as a result of *this* measure would be less if any existing affirmative action programs were declared unconstitutional under the United States Constitution. For example, five state affirmative action programs are currently the subject of a lawsuit. If any of these programs are found to be unlawful, then the state could no longer spend money on them – regardless of whether this measure is in effect.
- Finally, some programs we have identified as being affected might be changed to use factors other than those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could

be changed to target instead high schools with low percentages of UC or CSU applications.

For the text of Proposition 209 see page 94